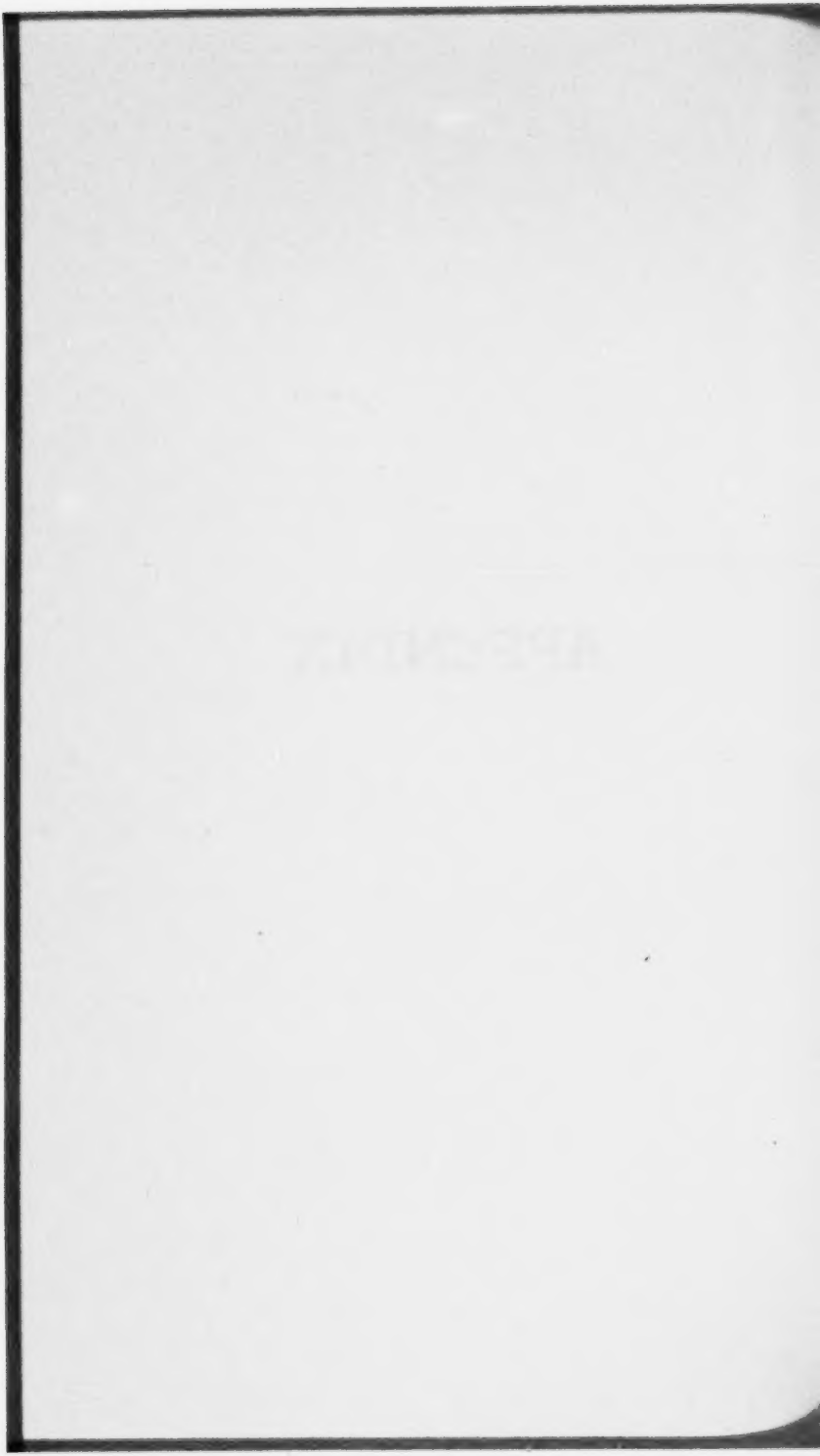

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12096

BENNIE C. CALDWELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided December 23, 1954

Mr. Albert J. Ahern, Jr., with whom *Mr. James J. Laughlin* was on the brief, for appellant.

Mr. Lewis A. Carroll, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Arthur J. McLaughlin* and *Samuel J. L'Hommedieu, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, WASHINGTON, and DANAHER, Circuit Judges.

EDGERTON, *Circuit Judge:* Caldwell appeals from a conviction[1] under Count I of an indictment. This count charges that he "offered a sum of money to Robert C. Fraction, endeavoring to influence the said Fraction to obtain information from the petit jurors theretofore im-

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[1] We reversed a former conviction. *Caldwell* v. *United States*, 92 U.S. App. D.C. 355, 205 F. 2d 879.

paneled in the United States District Court for the District of Columbia in the case of United States v. Lewis, Bellici and Acalotti (Criminal Case No. 476-49), as to the feelings and opinions of the said jurors concerning the said trial before the return of the verdict; by reason whereof, on or about January 19, 1950, within the District of Columbia, the said Bennie C. Caldwell did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia in violation of 18 U.S.C. 1503 (1948)."

18 U.S.C. § 1503 provides that whoever "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Fraction testified that Caldwell offered him $1,000 to "get among the jurors and keep him posted. . . . He wanted me to talk with the jurors, feel them out and see how they felt towards the particular case." There was no testimony as to the motive behind Caldwell's attempt to influence Fraction to get this information. There was no testimony that Fraction accepted any money or approached any juror. Caldwell testified that he never made any offer to Fraction.

The court charged the jury "as a matter of law, that if any person endeavors to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to their verdict, that is a corrupt endeavor to obstruct or impede the due administration of justice.

"Under the facts in this case, in order for you to find the defendant Caldwell guilty under Count I, the Government must prove beyond a reasonable doubt each and all of the following elements:

"(1) That there was a trial going on in the United States District Court for the District of Columbia,

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namely, Criminal No. 476-49, United States v. Lewis, Bellici and Acalotti;

"(2) That prior to the verdict the defendant Caldwell, in the District of Columbia, offered Robert C. Fraction money; and

"(3) That said money was offered by Caldwell for the purpose of having Fraction find out the feelings or opinions of the jurors sitting in said case.

". . . If you find beyond a reasonable doubt that the defendant offered Robert C. Fraction a sum of money for the purpose of obtaining information as to the feelings and opinions of the jurors sitting in the Lewis case, prior to the verdict, then you are instructed, as a matter of law, that such act was a corrupt endeavor to influence, obstruct, or impede the due administration of justice in this court, and that is all that the Government must prove in order to establish the defendant's guilt under Count I."

The Supreme Court has said: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. . . . The integrity of jury proceedings must not be jeopardized by unauthorized invasions." *Remmer* v. *United States*, 347 U.S. 227, 229. That unauthorized invasions "obstruct, or impede, the due administration of justice" is as plain as that they are prejudicial. Even "shadowing" jurors, without their knowledge, obstructs justice. *Sinclair* v. *United States*, 279 U.S. 749. Since unauthorized invasions of the integrity of jury proceedings are evil, they are "corrupt". *Cf. Bosselman* v. *United States*, 2 Cir., 239 Fed. 82, 86; *United States* v. *Polakoff*, 2 Cir., 121 F. 2d 333, 335.

The construction of the statute is a question of law for the court. The only questions of fact in the case are

the questions the judge submitted to the jury. The only intent involved in the crime is the intent to do the forbidden act. The defendant "must have had knowledge of the facts, though not necessarily the law, that made" his act criminal. *Morrissette* v. *United States*, 342 U.S. 246, 271.

No doubt one part of the judge's charge to the jury was too broad to be strictly accurate. Attempts by some persons in some circumstances to ascertain the feelings or opinions of jurors in a pending case might not be corrupt endeavors to obstruct or impede justice. If, for example, a bailiff made the attempt, believing he was carrying out an order of the trial judge, he might not be guilty. But such possibilities have nothing to do with this case. Caldwell's defense was an alibi. There was no evidence of any circumstances, and no contention that there was any circumstance, that might create a justification, privilege, or excuse for his attempt to ascertain the feelings or opinions of the jurors in the Lewis case. It follows that if, in not informing the jury that there might be such circumstances in some cases, the court can be said to have erred, the error did not affect substantial rights. It was completely harmless. To reverse this conviction would be like reversing an ordinary homicide conviction because the court did not explain to the jury that the homicide would have been justified if the accused had been a public officer duly executing a valid death sentence. Rule 52(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE provides that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Supreme Court has said "If, when all is said and done, the conviction is sure that the error did not influence the jury . . . the verdict and the judgment should stand . . ." *Kotteakos* v. *United States*, 328 U.S. 750, 764.

There is one more reason for affirmance. Rule 30 of the FEDERAL RULES OF CRIMINAL PROCEDURE provides among other things that "No party may assign as error

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any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Appellant's counsel did not state to the trial judge the respect in which the charge was inaccurate. Counsel said: "I think Your Honor stated in substance that if they find that Caldwell attempted to ascertain the feelings or opinion that would constitute a violation of the statute. We object to that, Your Honor, and say that the jury should have been instructed that they must go beyond that, and that they must find that there was an actual intent to effect it, in the discharge of their duties." This was incorrect. *Cf. Sinclair* v. *United States, supra.*

Affirmed.

WASHINGTON, *Circuit Judge,* dissenting: Tampering with a jury is an abhorrent crime, poisonous to our system of justice. The evidence against Caldwell was ample. But I am forced to the conclusion that the erroneous instructions given to the jury were highly prejudicial to the accused and deprived him of due process of law. He must, in my view, be granted a new trial. Such a trial would—regrettably—be his third, since the first trial had to be set aside because of the tactics of the prosecution. *Caldwell* v. *United States,* 92 U.S.App.D.C. 355, 205 F.2d 879 (1953). But the standards of justice cannot be relaxed in such a situation: the fact that an accused has undergone more than one trial does not dilute his right to just and lawful treatment. See *Leyra* v. *Denno,* 347 U.S. 556 (1954).

The statute here is aimed at any person who "corruptly" endeavors to influence a juror. 18 U.S.C. § 1503 (1951). The word "corruptly," the Fourth Circuit has said, "means for an improper motive." *Martin* v. *United States,* 166 F.2d 76, 79 (1948). The instructions to the jury trying Caldwell told them that "as a matter of law"

anyone who seeks to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to a verdict is engaged in "a corrupt endeavor to obstruct or impede the due administration of justice." This took from the jury a crucial issue — that of criminal intent. Corrupt motive is one of the essential elements of the crime defined in the statute: the issue whether the accused had that motive is one for the Government to prove beyond a reasonable doubt, and for the jury to determine on that proof. *Martin* v. *United States, supra.* The Supreme Court has only recently warned us that the judge cannot usurp this function of the jury: he cannot "presume" criminal intent from the defendant's actions. *Morrisette* v. *United States,* 342 U.S. 246, 274 (1952). To allow him to do so would be to "strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Id.* at 263.[1]

True, Caldwell's counsel did not make precisely this argument to the trial court. But he objected to the charge as given, because it told the jury that "if they find that Caldwell attempted to ascertain the feelings or opinion [of the Lewis jury] that would constitute a violation of the statute." His point was well taken. And even assuming that we are to treat the case as if no objection were raised, we must still grant a new trial. In *Screws* v. *United States,* 325 U.S. 91 (1945), where the question of criminal intent was submitted to the jury without proper instructions, and no objection was raised, the court reversed the conviction, saying: ". . . where

[1] As has been noted, the crime at hand is one for which the requirement of criminal intent is well established. The reasoning of Morissette is thus directly applicable to it. It is further to be noted that the crime of influencing a juror is part of the ancient common-law crimes of embracery and of obstructing justice. 18 AM. JUR. 616; 39 AM. JUR. 501-2. It was embodied in the statutory law of the United States by Act of March 2, 1831, "An Act declaratory of the law concerning contempts of court." (4 STAT. 487, 488)

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the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial." *Id.* at 107. I think we must make a like holding here.

Filed Feb. 11, 1954

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 970-50

UNITED STATES OF AMERICA

vs.

BENNIE C. CALDWELL

Judgment and Commitment

On this 11th day of February 1954 came the attorney for the Government and defendant appeared in person and by counsel, James J. Laughlin and Albert Ahern, Esquire.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation of Section 1503, Title 18 U. S. Code as charged in count one.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

twenty (20) months to five (5) years and to pay a fine of $500.00

BURNITA SHELTON MATTHEWS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Jan. Term, 1950

Criminal No. 970-50

UNITED STATES OF AMERICA

vs.

BENNIE C. CALDWELL, DANIEL M. GARY

Indictment

COUNT ONE:

On April 8, 1949, an indictment (No. 476-49) was filed in this Court against William Lewis, Attilio Acalotti and Frank Billici, charging them with operating a numbers lottery in the District of Columbia in violation of 22 D. C. Code 1501. On January 9, 1950, a petit jury was impaneled and the trial of that case commenced in Criminal Court Number One of this Court, which trial concluded on January 26, 1950, by the return by the jury of a verdict of guilty as to each defendant therein.

That Bennie C. Caldwell and Daniel M. Gary, hereby indicted, throughout the period from about April 8, 1949, to about January 26, 1950, conspired with each other, and with other persons to the grand jury unknown, to commit an offense against the United States, that is, a violation of 22 D. C. 701. The object and purpose of the conspiracy was to promise, offer and give money and other things of value to petit jurors sitting in the aforementioned trial, with intent to influence the decision, action and verdict of said jurors.

OVERT ACTS:

To effect the object of the conspiracy described in the preceding paragraphs, the defendants did the following overt acts, among others:

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1. On or about January 19, 1950, defendant Caldwell went to 2705 Stanton Road, S. E., within the District of Columbia, and there had a conversation with Robert C. Fraction, who was then a member of the panel of petit jurors in Criminal Court Number One.

2. On or about January 23, 1950, the defendant Gary went to 49-47th Street, S.E., within the District of Columbia, and there had a conversation with Luraner D. Ivey, who was then a member of the petit jury trying the aforementioned case.

3. On or about January 23, 1950, the defendant Caldwell went to 1329 Montello Ave. N.E., within the District of Columbia, and there had a conversation with George T. Walker, who was then the husband of Sallie J. Walker who was then a member of the petit jury trying the aforementioned case.

COUNT TWO:

On or about January 19, 1950, within the District of Columbia, Bennie C. Caldwell offered a sum of money to Robert C. Fraction, endeavoring to influence the said Fraction to obtain information from the petit jurors theretofore impaneled in the United States District Court for the District of Columbia in the case of *United States* v. *Lewis, Billici and Acalotti* (Criminal Case No. 476-49), as to the feelings and opinions of the said jurors concerning the said trial before the return of the verdict; by reason whereof, on or about January 19, 1950, within the District of Columbia, the said Bennie C. Caldwell did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia, in violation of 18 U.S.C. 1503 (1948).

COUNT THREE:

On or about January 23, 1950, within the District of Columbia, Daniel M. Gary promised and offered a sum of

money to Luraner D. Ivey, who then was, and was then and there known to the said Gary to be, a petit juror in the trial, in the United States District Court for the District of Columbia, of the case of *United States* v. *Lewis, Billici and Acalotti* (Criminal Case No. 476-49), with intent to influence the decision, action and verdict of the said Luraner D. Ivey in the said trial, in violation of 22 D. C. 701.

COUNT FOUR:

On or about January 23, 1950, within the District of Columbia, Bennie C. Caldwell caused a sum of money to be promised and offered to Sallie Walker, who then was, and was then and there known to the said Caldwell to be, a petit juror in the trial, in the United States District Court for the District of Columbia, of the case of *United States* v. *Lewis, Billici and Acalotti* (Criminal Case No. 476-49), with intent to influence the decision, action and verdict of said Sallie Walker in the said trial, in violation of 22 D. C. 701.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 970-50

UNITED STATES OF AMERICA, *Plaintiff*

vs.

BENNIE C. CALDWELL, *Defendant*

COUNT TWO:

On or about January 19, 1950, within the District of Columbia, Bennie C. Caldwell offered a sum of money to Robert C. Fraction, endeavoring to influence the said Fraction to obtain information from the petit jurors there-

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tofore impaneled in the United States District Court for the District of Columbia in the case of *United States* v. *Lewis, Billici and Acalotti* (Criminal Case No. 476-49), as to the feelings and opinions of the said jurors concerning the said trial before the return of the verdict; by reason whereof, on or about January 19, 1950, within the District of Columbia, the said Bennie C. Caldwell did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia, in violation of 18 U.S.C. 1503 (1948).

COUNT FOUR:

On or about January 23, 1950, within the District of Columbia, Bennie C. Caldwell caused a sum of money to be promised and offered to Sallie Walker, who then was, and was then and there known to the said Caldwell to be, a petit juror in the trial, in the United States District Court for the District of Columbia, of the case of *United States* v. *Lewis, Billeci and Acalotti* (Criminal Case No. 476-49), with intent to influence the decision, action and verdict of said Sallie Walker in the said trial, in violation of 22 D.C. 701.

Filed Dec. 23, 1954

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1954.

No. 12,096

BENNIE C. CALDWELL, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court
for the District of Columbia.

Before: EDGERTON, WASHINGTON, and DANAHER,
Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ..... ordered and adjudged by this Court that the judgment ..... of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: December 23, 1954.

PER CIRCUIT JUDGE EDGERTON.

Separate dissenting opinion by CIRCUIT JUDGE WASHINGTON.

Record 555

Under the facts in this case, in order for you to find the defendant Caldwell guilty under Count I, the Government must prove beyond a reasonable doubt each and all of the following elements:

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(1) That there was a trial going on in the United States District Court for the District of Columbia, namely, Criminal No. 476-49, United States v. Lewis, Bellici and Acalotti;

(2) That prior to the verdict the defendant Caldwell, in the District of Columbia, offered Robert C. Fraction money; and

(3) That said money was offered by Caldwell for the purpose of having Fraction find out the feelings or opinions of the jurors sitting in said case.

It is not necessary that you find that Caldwell actually tendered the money, or that Fraction accepted the money, or that he agreed to accept it or to do anything or that he actually did anything, pursuant to the alleged offer by the defendant Caldwell. If you find beyond a reasonable doubt that the defendant offered Robert C. Fraction a sum of money for the purpose of obtaining information as to the feelings and opinions of the jurors sitting in the Lewis case, prior to the verdict, then you are instructed, as a matter of law, that such act was a corrupt endeavor to influence, obstruct, or impede the due administration of justice in this court, and that is all that the Government must prove in order to establish the defendant's guilt under Count I.

Record 566

MR. AHERN: Your Honor, for the record I want to object to Your Honor's instructing the jury as to what constitutes an offense under the first count. I think Your Honor stated in substance that if they find that Caldwell attempted to ascertain the feelings or opinion that would constitute a violation of the statute. We object to that, Your Honor, and say that the jury should have been instructed that they must go beyond that, and that they must find that there was an actual intent to effect it, in the discharge of their duties.

Filed Feb. 3, 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1955

No. 12,096

BENNIE C. CALDWELL, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

Before: EDGERTON, WASHINGTON and DANAHER, *Circuit Judges,* in Chambers.

Order

Upon consideration of appellant's motion for leave to file a typewritten petition for rehearing and of the supplement to said motion, and it appearing that appellant's typewritten petition for rehearing has been lodged with the Court, it is

ORDERED by the Court that the motion for leave to file a typewritten petition for rehearing be granted and that the Clerk be, and he is hereby, directed to file forthwith appellant's typewritten petition for rehearing.

It is FURTHER ORDERED by the Court that appellant's petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated: February 3, 1955

Circuit Judge Washington is of the opinion the petition for rehearing should be granted.

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Filed Feb. 3, 1955

Before: STEPHENS, Chief Judge, and EDGERTON, WILBUR K. MILLER, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, *Circuit Judges* in Chambers.

Order

Upon consideration of appellant's motion for leave to file a petition for rehearing in banc in typewritten form, and of the supplement to said motion, and it appearing that appellant's typewritten petition for rehearing in banc has been lodged with the Court, it is

ORDERED by the Court that the motion for leave to file a typewritten petition for rehearing in banc be granted and that the Clerk be, and he is hereby directed to file forthwith appellant's typewritten petition for a rehearing in banc.

It is FURTHER ORDERED by the Court that appellant's petition for a rehearing in banc be, and it is hereby, denied.

Per Curiam.

Dated: February 3, 1955

Chief Judge Stephens is of the view the petition for rehearing in banc should be granted.

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1954.

BENNIE C. CALDWELL, *Petitioner,*

vs.

UNITED STATES OF AMERICA

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 4th, 1955.

/s/ EARL WARREN
Chief Justice of the United States.

Dated this 4th day of March, 1955.

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